Supreme Court, U.S.
FILED
AUG 18 1997
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No. 97 - 71

In the

# Supreme Court of the United States

October Term, 1996

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DEKALB STONE, INC.,

*Petitioner,*

*v.*

DEKALB COUNTY, GEORGIA, ET AL.,

*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## REPLY BRIEF FOR PETITIONER

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## RULE 29.6 STATEMENT

Petitioner hereby incorporates the Rule 29.6 listing in the Petition for Certiorari.

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## ARGUMENT

Respondents' brief in opposition confirms that certiorari should be granted in this case. Respondents essentially concede both that the Circuits are split on the question presented and, ultimately, that the decision below was in error. Because this case involves a recurring and fundamental question on which the Courts of Appeals are divided and because the decision below conflicts not only with decisions of the other Circuits but with well-established decisions of this Court, decisions that respondents have not even attempted to address, certiorari should be granted.

### 1. The question of whether a substantive due process cause of action is stated by an allegation that an executive action wrought an arbitrary restriction on the use of property is squarely presented here.

The centerpiece of respondents' first argument that certiorari should be denied is to misread the decision rendered below. It is not the case, as respondents would have it, see Respondents' Response to Petition for Writ of Certiorari ("Opp. Cert.") 10, that the Court of Appeals's decision was based on a bald assertion that the district court committed no abuse of discretion and that the Court of Appeals then "in addition" merely "went on to opine" that petitioner had failed to state a claim. *Id.* Failure to state a claim was the sole basis for the Court of Appeals's conclusion that the district court's denial of a preliminary injunction should be affirmed.

The Court of Appeals assumed that a protected property interest is implicated in this case, Appendix to Petition for Certiorari ("App.") 6a n.5 — as it is, see Petition for Certiorari ("Cert. Pet.") 15 — and it accepted as true petitioner's allegation that respondents deprived petitioner of that interest by "arbitrary and capricious" action. See App. 6a. It then held that the district court's decision to deny the preliminary injunction was not an abuse of discretion — was not, that is, reversible error — solely on the basis that "the cause of action pled by [petitioner] does not exist; therefore, [petitioner] cannot show a substantial likelihood of success on the merits. The district court properly denied the motion for preliminary injunction." App. 8a-9a.

The question of whether an allegation that executive action arbitrarily deprived an individual of a protected interest in real property states a cause of action under the Due Process Clause of the Fourteenth Amendment (or, presumably, of the Fifth Amendment in

a case involving federal action) is therefore squarely and inescapably presented in this case. It is, indeed, the only question presented by the decision below. The Court of Appeals's opinion is neither long nor complicated, and this Court can clearly see for itself — in black and white at pages 5a-9a of the Appendix to the Petition for Certiorari — that the primary basis urged by respondents for denying review here is grounded on nothing more than a mischaracterization of the Court of Appeals's opinion.

2. **This case is not "interlocutory" in any sense that counsels against review on certiorari.**

Respondents' next argument is related to the first. Respondents represent to this Court that petitioner can somehow "proceed to trial on the merits and prove other facts to potentially change the result of its failed request for injunctive relief." Opp. Cert. 11. That is, they suggest that this is merely an interlocutory appeal, and that, because petitioner may yet win below, review by this Court is not necessary now.

Respondents do not — presumably because they cannot — explain what "facts" petitioners might prove to prevail on remand from the Court of Appeals decision when the Court of Appeals has held that an allegation of arbitrary deprivation of property is *not sufficient to state a claim upon which relief can be granted.* Although the interlocutory procedural posture of a case may counsel against a grant of certiorari where further proceedings may obviate the need for review by eliminating the basis for petitioner's dissatisfaction with the ruling of the Court of Appeals, this case is *not* interlocutory in that sense: since the Court of Appeals based its decision on failure to state a claim, the substantive due process claim is for all practical purposes at an end if certiorari is denied.

Respondents suggest that granting certiorari will result in "piecemeal litigation" and "could result in multiple appeals." Opp. Cert. 11. This is untrue. Because the Court of Appeals held that petitioner failed to state a claim, the actual misuse of judicial resources through wasteful multiple appeals would come if this Court were to deny certiorari in order to permit a remand to the district court for dismissal of the action. In that event, petitioner would be required to appeal anew to the Eleventh Circuit and to seek certiorari again from that court's affirmance of the district

court's dismissal, forcing both the Court of Appeals and this Court needlessly to address twice the issue — whether or not petitioner has stated a claim upon which relief can be granted — that is already cleanly presented in the instant Petition.

3. **Disputed factual questions that have not been addressed below do not provide an appropriate basis for denying review.**

The Court of Appeals has held that, unlike a similarly situated plaintiff in another Circuit, petitioner is not entitled to a trial at which it can attempt to demonstrate the truth of its allegations that respondents have acted arbitrarily to deprive it of its interest in the use of the real property that is the subject of this case. Yet respondents devote much of their brief in opposition to contesting what they themselves describe as a "factual dispute," Opp. Cert. 10, that was not resolved below. Since petitioners' very complaint is that their lawsuit has been cut short by the Court of Appeals's conclusion that an arbitrary executive restriction of an individual's use of his property can *never* violate substantive due process, nothing could be less relevant. Respondents cannot avoid review of the question of whether petitioner is entitled to try to prove its case by arguing that they are correct about the very disputed issues petitioner has been denied the right to litigate.

Respondents contend before this Court that the only nonconforming use of the subject property permitted by the DeKalb County Board of Appeals was the operation of a "dimension stone quarry." See Opp. Cert. 10. Respondents go so far as to characterize petitioner's use of the land as a quarry including blasting and rock crushing as "illegal." See, *e.g.*, *id.* at 2, 5, 7. Indeed, many of their arguments proceed as though the scope of the approved non-conforming use had been established at trial. See, *e.g.*, *id.* at 17 (arguing that the case involves only the question whether there is a constitutional right to expand a non-conforming use of property); *id.* at 6.

The significance of respondents' contention is that, if it were true, and if respondents had believed it to be true at all times since the Board acted, it would follow that their enforcement actions against petitioner's attempts at blasting and rock crushing on the property at issue here would not have been unconstitutionally

arbitrary. The allegations of petitioner's complaint, of course, are that the nonconforming use was *not* so limited, and that the enforcement actions taken by respondents were instead taken arbitrarily, capriciously, without rational basis, and, in some instances, willfully for partisan, political or personal reasons. Cert. Pet. 6-7; see also *id.* at 5-6 (Recorder's Court decision characterizes the non-conforming use to include "blasting and rock crushing").

If after a trial respondents are found to be correct in their tendentious characterization of the Board of Appeals's decision (and if they are shown to have understood the decision contemporaneously in the way they now claim, and to have based their enforcement actions on that understanding), then petitioner will have failed to carry its burden to prove that respondents' enforcement actions were arbitrary. But the contested questions raised by respondents are obviously irrelevant at this stage of the proceedings. The Court of Appeals's decision has deprived petitioner of the very right to prove that respondents' actions were constitutionally arbitrary — that is, to prove that the Board of Appeals's decision was not restricted to any particular type of quarrying and that respondents abused their power by nonetheless taking arbitrary enforcement action against petitioner's lawful quarrying activity — a right that petitioner would have had had it brought this suit in virtually any other Circuit in the United States.

4. **Respondents ultimately do not even argue that the decision below is correct.**

On the merits, respondents do not even consistently attempt to defend the holding of the Court of Appeals that executive action depriving an individual arbitrarily of state-created property rights can never violate substantive due process. Of course, in light of the significant Circuit conflict on that basic issue, review would be appropriate even if the decision below were correct. But respondents' own brief makes clear that this is not a case where this Court can conclude that the Court of Appeals was correct and that, therefore, it might be better to wait for a different case implicating the split — one that holds that an allegation of arbitrariness *does* state a claim — before granting review.

**a.** On the merits, respondents seem to agree with us that an allegation of executive arbitrariness *can* state a claim under

substantive due process. The most they say, citing an article in the Harvard Law Review, is that "[w]hen a Fourteenth Amendment claim arises from an administrative act, this *typically* implicates only procedural due process rights." Opp. Cert. 14 (citing "Developments in the Law — Zoning," 91 Harv. L. Rev. 1427, 1509 (1978)). Respondents do not claim that an administrative act *cannot* implicate substantive due process, nor do they come to terms with — or even address — this Court's decisions evaluating administrative action to ensure that it does not arbitrarily deny life, liberty or property. See, *e.g.*, Cert. Pet. 17-18 (citing cases). The article they cite does not suggest, as the Court of Appeals held, that administrative acts affecting property can never violate substantive due process. Indeed, that article explicitly acknowledges the substantive "constraint imposed by due process — that zoning measures be substantially related to 'public health, safety, morals, or general welfare.'" 91 Harv. L. Rev. at 1502 (quoting *Euclid* v. *Ambler Realty*, 272 U.S. 365, 395 (1926)).

Respondents say that "[c]onversely, when the Fourteenth Amendment claim arises from a legislative act, the Supreme Court *tends* to review it under substantive due process analysis." Opp. Cert. 14 (emphasis added). They also cite a number of cases in which land use decisions were evaluated for consistency with procedural due process and argue the *non sequitur* that only procedural due process analysis is appropriate in such cases. See *id.* at 14; see also *id.* at 22-23.

But under the American system of justice, courts do not distill the Platonic essence of the facts alleged in a lawsuit so as to discern the typical, and hence appropriate, legal claim into which the facts fit. Rather, courts address the claims actually made by the adverse parties before them. The fact that land use disputes most often give rise to claims of procedural irregularity surely does not imply that they may never give rise to claims of substantive impermissibility. And this Court's decisions, with the decisions of all the lower courts save the Eleventh Circuit, make clear that there is no such limitation on the scope of arbitrariness review under the Due Process Clause.

**b.** Respondents also argue that there can be no substantive due process claim here, because "the claimed right arises from a specific constitutional provision," Opp. Cert. 17 (citing *Albright* v. *Oliver*, 510 U.S. 266 (1994) (plurality opinion), and *Graham* v. *Connor*,

490 U.S. 386 (1989)) — the Takings Clause of the Fifth Amendment made applicable to the States through the Due Process Clause of the Fourteenth Amendment. In this they appear to urge the theory put forward by the Ninth Circuit in its recent decision in *Armendariz* v. *Penman*, 75 F. 3d 1311 (9th Cir. 1996) (en banc), a theory that conflicts with both the decision below *and* with the approach taken by all the other Circuits. See Cert. Pet. 28. Thus even if this theory were correct, it would counsel in favor of, not against, a grant of certiorari here.

In any event, it is not correct. The plurality opinion in *Albright* and the opinion of the Court in *Graham* are inapplicable because petitioner does not seek to "'expand'" the scope of substantive due process. *Albright*, 510 U.S. at 271 (plurality opinion) (citation omitted); see also *id.* at 281 (Ginsburg, J., concurring) (declining to "'break new ground'" in the substantive due process area because "the Fourth Amendment proscribes the . . . misconduct . . . allege[d]") (citation omitted). As this Court's decisions make clear, the cause of action brought by petitioner is hardly new. Indeed, it has long been recognized by this Court that substantive due process and takings challenges to land-use decisions comfortably complement each other. See, *e.g.*, *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 835 n.3 (1987).

Indeed, respondents' novel theory — which would apply to bar substantive due process challenges to both executive *and* legislative action limiting the use of property — would lead to the absurd and unprecedented result that an individual could not challenge any regulation of or restriction on the use of property as arbitrary and irrational if it came *close* to violating (or did violate) the Takings Clause (for example, because of a colorable claim that the restriction lacks any public purpose or the necessary provision for just compensation), in which case *only* a takings challenge would be entertained.[1] An arbitrariness challenge would lie, however, against

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[1] Perhaps substantive due process would vanish only where a takings claim was actually *stated*. Whether *Albright* and *Graham* can apply where the claimed due process right would not be *redundant* of another explicit constitutional right remains at best an open question. See *Albright*, 510 U.S. at 281 (Ginsburg, J., concurring); see also *id.* at 287-289 (Souter, J., concurring in judgment).

any regulation or restriction that didn't even come close to being a taking! Yet of course this Court has routinely evaluated all manner of restrictions on property for substantive conformity with the Constitution under the Due Process Clause without regard to the Takings Clause, and indeed has done so even after the decisions in *Albright* and *Graham*. See, *e.g.*, *Bennis* v. *Michigan*, 116 S.Ct. 994, 998 (1996); *Concrete Pipe & Products* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 636-641, 641-647 (1993) (addressing substantive challenges under *both* the Due Process Clause and the Takings Clause).

In addition, as this Court made clear just this year, respondents are wrong in saying, see Opp. Cert. 20, that petitioner's claim would not be ripe if construed as an incorporated Takings Clause claim under the Due Process Clause of the Fourteenth Amendment. See *Suitum* v. *Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1667 (1997). Contrary to respondents' contention, therefore, petitioner would have *no* reason in this case to "disguise," Opp. Cert. 18, what should have been brought as a takings claim.

c. Respondents next contend that only "fundamental rights" are protected under substantive due process, and that "property interests arising under state law" are *not* so protected.

As to the former proposition, see Opp. Cert. 15-17, respondents are wrong if they think that the doctrine that limits the application of heightened judicial scrutiny to "fundamental" or "protected" interests somehow limits the longstanding constitutional principle that *no* infringement of life, liberty or property will be permissible if it is irrational or arbitrary. See Cert. Pet. 10. Again, they do not address the long line of Supreme Court authority on this point cited in the Petition. See *id.* at 10-13.

As to respondents' latter claim, see Opp. Cert. 21-23, the text of the Constitution itself — in providing protection of "property" on an equal footing with "life" and "liberty" — demonstrates that it is insupportable. Respondents do not address the cases cited in the Petition that demonstrate that property interests created by state law are protected by substantive due process. See Cert. Pet. 13-15. And a line of cases from *Nollan* to *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), to *Dolan* v. *City of Tygard*, 512 U.S. 374 (1994), has made unmistakably clear that the right to own, possess, and use one's property is no longer to be treated as the

"poor relation" of American constitutional law. See *Dolan*, 512 U.S. at 392.

**d.** Finally, respondents seem to suggest that petitioner seeks to constitutionalize the multitude of land-use decisions made by local governments. See, *e.g.*, Opp. Cert. 1-2, 10, 21. This is simply not the case. As the very small number of successful arbitrariness claims reported from the Courts of Appeals makes clear, the standard of constitutional arbitrariness is a stringent one — and, under the appropriate standard, merely erroneous or ill-advised land-use decisions will not be held to violate the Constitution. Nonetheless, under this Court's decisions, petitioner is entitled to attempt to prove its allegations that respondents' enforcement actions were taken arbitrarily, capriciously and without any rational basis.

5. **Respondents concede there is a Circuit split, and their allegation that there is a body of "emerging caselaw" consistent with the decision below is plainly wrong.**

As this Court can see, respondents address only a handful of the conflicting Court of Appeals cases cited in the Petition for Certiorari.

To begin with, in an attempt to persuade this Court not to grant certiorari at this time, respondents argue that there is a body of "emerging caselaw," Opp. Cert. 30, that is consistent with the decision below. Their suggestion seems to be that this Court should stay its hand to permit evolution in the Circuits toward uniform acceptance of the Eleventh Circuit's wayward view.

There is nothing to this plea. The many cases cited by petitioner demolish this claim and, indeed, respondents themselves cite recent cases from several Circuits that flatly conflict with the decision below. To give just the most obvious example, they cite a 1995 Third Circuit decision recognizing a substantive due process cause of action for an arbitrary denial of a request for a zoning variance — a decision that was rendered *after* the Eleventh Circuit's decision in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. denied, 115 S.Ct. 898 (1995). See Opp. Cert. 24 (citing *DeBlasio* v. *Zoning Board of Adjustment for the Township of West Amwell*, 53 F. 3d 592 (3d Cir. 1995)). This alone would be sufficient to put to rest the claim of an "emerging trend," Opp. Cert. 23, that might militate in favor of this Court staying its hand. In point of fact, far from announcing a rule that has been embraced or

adopted by other courts, *McKinney* has not been followed by *any* other Circuit in the years since it was decided.

And indeed, although they scratch only the surface of the case law cited in the Petition, respondents do acknowledge, as they must, that the Circuits are divided. In addition to the Third Circuit, they acknowledge that decisions from the Second, Fifth, Seventh and D.C. Circuits conflict with the decision of the Eleventh Circuit below. See Opp. Cert. at 24 (citing *Brady* v. *Colchester*, 863 F.2d 205 (2d Cir. 1988)); *id.* at 25 (citing *Honore* v. *Douglas*, 833 F.2d 565 (5th Cir. 1987)); *id.* at 27 (citing *Polenz* v. *Parrott*, 883 F.2d 551 (7th Cir. 1989)); *id.* at 30 (citing *Shenk* v. *Zoning Comm'n of the District of Columbia*, 440 F2d 295 (D.C. Cir. 1971)). Respondents do not even address the Fourth Circuit's decision in *Scott* v. *Greenville County*, 716 F.2d 409 (4th Cir. 1983), see Cert. Pet. 25, which also conflicts with the decision below.

They do attempt unavailingly to distinguish some of the decisions of several of the other Circuits. With respect to the Sixth Circuit, they acknowledge that *Gutzviller* v. *Fenik*, 860 F.2d 1317 (6th Cir. 1988), conflicts with the decision below, but argue that after *Albright* and *Graham*, it would have to be decided under Title VII. Opp. Cert. 26. Of course neither *Albright* nor *Graham* remotely suggests that the availability of a statutory remedy has any bearing on the availability of a substantive due process cause of action. But in any event, regardless of whether a case presenting the facts of *Gutzwiller* could or should be decided on another ground today, the case would still stand for the proposition — one that has never been retreated from in any way — that an arbitrary deprivation of a state-created property right states a substantive due process claim in the Sixth Circuit. And indeed, respondents do not even address the other Sixth Circuit decision cited in the Petition, *Wilkerson* v. *Johnson*, 699 F.2d 325 (6th Cir. 1983), see Cert. Pet. 26, which *also* conflicts with the decision below.

Respondents similarly attempt to recharacterize the decisions of the First Circuit in *Ortiz De Arroyo* v. *Barcelo*, 765 F. 2d 275 (1st Cir. 1985), and the Eighth Circuit in *Littlefield* v. *City of Afton*, 785 F.2d 596 (8th Cir. 1986), as Taking Clause cases. But the Courts of Appeals in those cases did not treat them as such. Rather, they recognized in those cases the availability of the very cause of action the Eleventh Circuit held was not available here. And again,

respondents do not address the First Circuit's decision in *Roy* v. *City of Augusta*, 712 F. 2d 1517 (1st Cir. 1983), see Cert. Pet. 21, which also conflicts with the decision below.

With respect to the First, Second, Fourth and Fifth Circuits, respondents also attempt to argue that the existence of decisions reporting unsuccessful substantive due process challenges somehow undermines the conflict between those Circuits and the Eleventh Circuit, and somehow renders the law in those Circuits "consistent" with the decision below. See, *e.g.*, Opp. Cert. 25. But none of the cases they cite calls into question the continued viability of the cause of action for arbitrary deprivation of a state-created property interest. Indeed, *each of them* explicitly reaffirms its availability. See *PFZ Properties* v. *Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991); *Zahra* v. *Town of Southold*, 48 F.3d 674, 679-682 (2d Cir. 1995); *RRI Realty Corp.* v. *Village of Southampton*, 870 F.2d 911, 914-918 (2d Cir. 1989); *Gardner* v. *City of Baltimore Mayor and City Council*, 969 F.2d 63, 68 (4th Cir. 1992); *Williams* v. *Texas Tech University Health Sciences Center*, 6 F.3d 290, 294 (5th Cir. 1993).

With respect to the Third, Seventh and D.C. Circuits, respondents don't even have any such cases on which to rely. With respect to the Seventh Circuit, respondents do not argue that the cause of action has not been recognized or has been undermined, but only that *Polenz* was "unfortunate and unnecessary." Opp. Cert. 28. They do not address the decision in *Clark* v. *Winnebago County*, 817 F.2d 407, 408-409 (7th Cir. 1987), which also conflicts with the decision below. With respect to the D.C. Circuit, they assert, without any support, that *Shenk* might come out differently if that Court of Appeals were called upon to decide it again. Opp. Cert. 30. They make no argument at all with respect to the Third Circuit, and, similarly, address only one of the several Third Circuit cases cited in the Petition that conflict with the decision below.

## CONCLUSION

This case presents an ideal vehicle for addressing the persistent split among the Courts of Appeals, a split with respect to which at least two of the Courts of Appeals have explicitly asked for Supreme Court guidance on a matter of obviously fundamental constitutional import. See Cert. Pet. 24 n. 8 (Third Circuit), 26-27 (Seventh Circuit). Certiorari should be granted.

Respectfully submitted,

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